

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL G. GREER
Claimant

VS.

WIFCO STEEL, INC.
Respondent

AND

TWIN CITY FIRE INSURANCE CO.
Insurance Carrier

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Docket No. 1,061,486

ORDER

Claimant requests review of the November 13, 2012, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

APPEARANCES

Roger A. Riedmiller, of Wichita, Kansas, appeared for the claimant. Bruce L. Wendel, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record consists of the August 24, 2012, Discovery/Evidentiary Deposition of Michael Greer (claimant), with attached exhibits; the August 24, 2012, Discovery/Evidentiary Deposition of Martin Ramirez, with attached exhibits; the October 18, 2012, Preliminary Hearing transcript with the attached exhibits, and the documents of record filed with the Kansas Division of Workers Compensation (Division).

ISSUES

The Administrative Law Judge (ALJ) found claimant did not violate any safety rules and authorized Drs. Melhorn and Baumgartner to treat claimant. Dr. Baumgartner was authorized to refer claimant for psychiatric counseling as deemed necessary, and respondent was ordered to reimburse claimant for the prescriptions he paid.

The claimant requests review of the ALJ's Order arguing that he failed to make a ruling regarding claimant's request for temporary total disability compensation (TTD) or payment of outstanding medical bills, and that he exceeded his jurisdiction in failing to rule on those issues.

Respondent argues that claimant's appeal should be dismissed and the order remain in full force and effect as the issues dealing with past medical treatment and TTD are not issues over which the Board takes jurisdiction on appeal from a preliminary hearing order.

FINDINGS OF FACT

Claimant argues the ALJ exceeded his jurisdiction in not ruling on specific issues raised at the preliminary hearing. Respondent contends the Board does not have jurisdiction over those disputed, but unaddressed issues dealing with claimant's entitlement to TTD and outstanding bills for past medical treatment. Claimant served respondent with its claim for compensation letter dated July 10, 2012. The letter identifies specific issues to be brought before the ALJ, including claimant's entitlement to TTD and past and future medical treatment.

This matter went to preliminary hearing on October 18, 2012. At that time claimant raised several issues, including his right to TTD and the payment of outstanding medical bills which were marked as exhibits and attached to the preliminary hearing transcript. The Order, issued on November 13, 2012, found claimant's claim compensable holding that claimant did not violate safety rules which would have resulted in a denial of benefits. The Order went on to authorize future medical treatment and psychiatric counseling, and ordered the reimbursement for certain prescriptions paid for by claimant. The Order is silent regarding claimant's request for TTD and the payment for past medical treatment.

PRINCIPLES OF LAW AND ANALYSIS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed and the matter remanded to the ALJ for a determination of the issues not yet decided.

K.S.A. 2011 Supp. 44-555c(a) states in part:

. . . The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

The Workers Compensation Act (act) provides that the Board has exclusive jurisdiction to review the decisions, orders and awards of compensation entered by an administrative law judge under the Act. This does not grant the Board original jurisdiction over issues not determined by an ALJ.

K.S.A. 2011 Supp. 44-534a(a)(1)(2) states:

(a)(1) After an application for a hearing has been filed pursuant to K.S.A. 44-534, and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total or temporary partial disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If

temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

However, the Board can also exercise jurisdiction on an appeal from a preliminary hearing order if the ALJ exceeded his jurisdiction in granting or denying the relief requested.

K.S.A. 2011 Supp. 44-551(i)(2)(A) states:

(2)(A) If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

Here the ALJ issued a preliminary decision but failed to determine all of the issues presented at the preliminary hearing. K.S.A. 44-534a(a)(1)(2) requires that a hearing be held within the statutorily prescribed time and a decision be issued in a timely fashion.

The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case.¹

No particular form of proceeding is required to constitute due process in administrative proceedings; all that is required is that the liberty and property of the citizen be protected by rudimentary requirements of fair play. Its requirements include the revelation of the evidence on which a disputed order is based, an opportunity to explore that evidence, **and a conclusion based on reason**; and its essential requirements are met where the administrative body is required to

¹ *Collins v. Kansas Milling Co.*, 207 Kan. 617, 620, 485 P.2d 1343 (1971).

determine the existence or nonexistence of the necessary facts before any decision is made. (emphasis added).²

Where an administrative body acts in a quasi-judicial capacity, the constitutional requirements of due process are applicable to proceedings had before it.³

The Board has previously found that an action by the ALJ which constituted a denial of due process exceeded the ALJ's jurisdiction under K.S.A. 44-551.⁴

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁵

The Board would not generally take jurisdiction of a dispute over TTD on an appeal from a preliminary hearing order. However, when, as here, the ALJ simply failed to rule on a presented issue, the question becomes one of due process, and the Board is not limited by the designated issues in K.S.A. 2011 Supp. 44-534a. As noted above in *Collins* and *Kaufman*, due process requires not only notice and the opportunity to be heard and defend, but also "**a conclusion based on reason**". It serves no purpose to allow notice and an opportunity to be heard when a determination on the specific presented issues never manifests. This Board Member finds the ALJ exceeded his jurisdiction in failing to reach a determination on specific issues presented at the preliminary hearing. This

² 73 C.J.S. *Public Administrative Law and Procedure* § 59; See also *Johnston Coal & Coke Co. v. Dishong*, 198 Md. 467, Syl. ¶ 5, 84 A. 2d 847 (1951); *Kaufman v. Kansas Dept. of SRS*, 248 Kan. 951, 811 P.2d 876 (1991); *Peck v. University Residence Committee of Kansas State Univ.*, 248 Kan. 450, 807 P.2d 652 (1991); *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 770 P.2d 423 (1989).

³ *Adams v Marshall*, 212 Kan. 595, 512 P.2d 365 (1973).

⁴ *Church v. White Star Commercial Coating, Inc. and McPherson Contractors, Inc.*, Docket No. 204,042, 1999 WL 1314831 (Kan. WCAB Dec. 30, 1999).

⁵ K.S.A. 2011 Supp. 44-534a(a)(2).

constitutes a denial of due process. The matter shall be remanded to the ALJ with instructions to determine all issues presented at the preliminary hearing.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Failure to reach a decision on issues presented at a preliminary hearing is a denial of due process and exceeds the ALJ's jurisdiction. The matter is remanded to the ALJ with instructions to determine the issues which were presented at the October 18, 2012, preliminary hearing but not decided.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated November 13, 2012, is affirmed insofar as a decision was rendered. But the matter is remanded to the ALJ with instructions to decide those issues presented at the preliminary hearing but not yet determined.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Thomas Klein, Administrative Law Judge

⁶ K.S.A. 2011 Supp. 44-534a.